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No. 81-2147

In the Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF ARIZONA, ET AL., PETITIONERS

v.

SAN CARLOS APACHE TRIBE OF ARIZONA and
THE NAVAJO NATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NAVAJO NATION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Navajo Nation can be compelled to litigate its federal water rights claim in an Arizona state court, even though Arizona's State Constitution and Arizona's Enabling Act disclaim jurisdiction over Indian tribes.

2. Whether, assuming concurrent state court jurisdiction does exist, the Navajo Nation's federal action, presenting a discrete issue of federal law, should be stayed, for reasons of "wise judicial administration," pending state court adjudication of 58,000 state law claims.

PARTIES IN THE COURT OF APPEALS

In addition to the State of Arizona, other appellees in the Court of Appeals were:

(a) in the *San Carlos Apache Tribe* case, John M. Little (individually and as Acting Commissioner of the State Land Department of the State of Arizona); Salt River Valley Water Users' Association; Salt River Project Agricultural Improvement and Power District; City of Phoenix; City of Prescott; City of Jerome; Phelps Dodge Corporation; Phelps Dodge Industries, Inc.; Arizona Water Company; Miller Brothers Farms, Inc.; Camp Verde Water Systems; Cottonwood Water Works, Inc.; Copper Basin Water Co.; V Bar V Cattle Co., Inc.; Harold W. Bullard; and a class of all claimants of ownership or use rights to water in the Verde River or its tributaries.

(b) in the *Navajo Nation* case, the United States of America; Phelps Dodge Corporation; M. L. Hall; M. J. Wiltbank; M. Brown; J. S. Burke; L. Green; and a class of all claimants of ownership or use rights to water in the Little Colorado River Basin.

Other appellants in the *San Carlos Apache Tribe* case were the Payson Community of Yavapai-Apache Indians; the Salt River Pima-Maricopa Indian Community; and the Fort McDowell Mohave-Apache Indian Community.

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BRIEF FOR THE NAVAJO NATION IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals in *Navajo Nation* v. *United States* (Pet. App. B-1 to B-4) is reported at 668 F.2d 1100. The order of the District Court in that case (Pet. App. D-1) is not reported.

The opinion of the Court of Appeals in *San Carlos Apache Tribe* v. *Arizona* (Pet. App. A-1 to A-13) is reported at 668 F.2d 1093. The opinion of the District Court in that case (Pet. App. E-1 to E-15) is reported at 484 F. Supp. 778.

The opinion of the Court of Appeals in *Northern Cheyenne Tribe* v. *Adsit* (Pet. App. C-1 to C-22) is reported at 668 F.2d 1080. The opinion of the District Court in that case is reported at 484 F. Supp. 31.

This brief is submitted in opposition to petitioners' application to review the decision of the Court of Appeals

in *Navajo Nation*. That decision was rendered contemporaneously with the decisions in *San Carlos Apache Tribe* and *Northern Cheyenne Tribe*. The three cases were argued at the same time before the same panel, and the decision in *Navajo Nation* relied on the other decisions. Hence this brief, where appropriate, discusses all three decisions. Pursuant to this Court's Rule 19.4, petitioners have filed a single petition seeking review of both *San Carlos Apache Tribe* and *Navajo Nation*. These cases were never consolidated, however, and petitioners' amalgamated presentation confuses their respective facts. For purpose of clarity, therefore, this brief isolates and discusses the facts of *Navajo Nation*.

JURISDICTION

The judgments of the Court of Appeals were entered on February 23, 1982 (*San Carlos Apache Tribe*) and February 24, 1982 (*Navajo Nation*). The petition for a writ of certiorari was filed on May 12, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Navajo people now live on the harsh and arid lands of Arizona, New Mexico, and Utah that constitute the Navajo Reservation. Through this economically disadvantaged reservation flow the precious waters of the Little Colorado River.

The Navajos were confined to this reservation by a treaty, dated June 1, 1868, between the United States and the Navajo Nation. 15 Stat. 667. The United States designed the treaty to end years of war and preserve the peace, not to condemn the Navajo people to perpetual poverty on dry lands. Therefore, as this Court decided in *Winters* v. *United States*, 207 U.S. 564 (1908), such peace treaties reserve for Indian tribes living on a reservation the water necessary for the well-being of the tribes, their crops, and their livestock. See also *Arizona* v. *California*, 373 U.S. 546 (1963).

The treaty vesting these water rights in the Navajo Nation was signed long before Arizona entered the Union. Likewise, the Navajo Nation established its permanent home on the reservation long before Arizona entered the Union. To prevent any conflict between the newly-founded state and the long-established sovereign Indian tribe, Arizona, in its state constitution, "forever disclaimed" any power or jurisdiction over the Navajo Reservation.[1] Indeed, this disclaimer was required by the Enabling Act under which Arizona was admitted to the Union. 36 Stat. 569.

In a further effort to prevent a conflict between the states and the Indians residing on reservations within the states, Congress gave the federal courts original jurisdiction over all actions brought by an Indian tribe. 28 U.S.C. 1362.[2] Section 1362 was enacted to ensure that the tribes would not be required to conduct litigation in the state courts, at least not with respect to rights to tribal lands governed by federal treaties and laws. See H.R. Rep. No. 2040, 89th Cong., 2d Sess. (1966).

The Arizona constitutional disclaimer, Section 1362, and a large body of decisional law firmly establish the

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[1] Article XX, paragraph 4, of the Arizona Constitution provides:

> The people inhabiting this State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished, the same shall be, and remain, subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States.

[2] 28 U.S.C. 1362 provides:

> The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

"policy of leaving Indians free from state jurisdiction and control." *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 168 (1973).

Accordingly, when the Navajo Nation decided to translate its treaty rights into reality, it sought the protection of the federal courts and thereby respected the disclaimer set forth in the Arizona Constitution.

Commencement of this Federal Action

To establish its rights in the Little Colorado River, the Navajo Nation brought this action in the United States District Court for the District of Arizona on April 17, 1979.

Significantly, the Navajos brought this action themselves, in their own name and on their own initiative. The action was not brought by the United States as trustee for the Navajos, as sometimes happens in litigation involving Indians. On the contrary, the United States was named as a defendant, along with a class of all other claimants to the waters of the Little Colorado.

Significantly, as well, the Navajos seek in this action only to establish their own rights. They seek a declaration that they are entitled to certain waters of the Little Colorado, and that their entitlement dates back at least to the signing of the Treaty of 1868. The Navajos do not seek to adjudicate the water rights of any other claimants to the Little Colorado, or to establish the dates when any such other rights accrued.

Finally, it is significant that the Navajos' claims are based on the federal law doctrine of reserved water rights and the 1868 Treaty. The Navajos do not assert any claims under the state law doctrine of prior appropriation or under any other aspect of state law. Moreover, since the Navajos do not seek to adjudicate the rights of other claimants—most of whom do rely on state law—this action turns solely on issues of federal law.

In short, this action presents a discrete, narrow federal claim on behalf of a soverign Indian tribe. That claim can be swiftly and efficiently adjudicated in federal court. The federal court undisputedly has jurisdiction over that claim, under Section 1362. The State of Arizona has disclaimed jurisdiction over the claim, through the disclaimer provision in the Arizona Constitution.

The Arizona State Court Proceeding

On April 24, 1979, after this federal lawsuit commenced, Arizona adopted legislation creating a new state judicial procedure for determining rights to waters located in Arizona. Ariz. Rev. Stat. Ann. §§ 45-251 to 45-259. This legislation purported to commence a state court general stream adjudication to determine the rights of all claimants to waters of the Little Colorado River.[3]

In its petition, Arizona asserts that there are 58,000 such claimants (Pet. 7). Arizona offers no estimate of the amount of time it will take the Apache County Superior Court to adjudicate these 58,000 claims. It is reasonable to expect that the adjudication of so many claims in the Arizona state proceeding will take decades to complete. Indeed, the record below is barren of any evidence that the state proceeding has even started, except in the most formalistic sense. In the 27 months from the "commencement" of the proceeding to the argument of this action in the Ninth Circuit, nothing happened: no judge was assigned, no parties were served, no procedural steps were taken.

Nevertheless, Arizona contends that the Navajos' federal claim should, in the name of "wise judicial administration," be mired in this Dickensian state proceeding, rather than disposed of rapidly in the federal court.

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[3] The statute did so by automatically converting into state court actions all petitions for water rights determinations previously filed with the State Land Department. Ariz. Rev. Stat. Ann. § 45-258. Such a petition regarding the Little Colorado River had been filed in 1978, although no action was ever taken thereon.

The District Court's Stay Order

On July 27, 1979, Arizona moved to dismiss the Navajos' amended complaint in the federal action. Arguing that this case is controlled by *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976) (*"Akin"*), Arizona contended that the narrow federal claim asserted herein should be adjudicated in the Arizona state proceeding. The Navajo Nation opposed the motion to dismiss, arguing that it had a right to a federal forum for its federal claim to the waters of the Little Colorado.

On April 17, 1980, the District Court denied Arizona's motion to dismiss, thereby recognizing that it had jurisdiction over the claim and that the amended complaint stated a good cause of action. At the same time, however, the District Court entered an order staying the federal action pending the determination by the Arizona state courts of the various rights of the 58,000 claimants to the waters of the Little Colorado.

The District Court took that action *sua sponte*. No party to this case had sought, or even suggested, a stay. The prospect of a stay had never been argued; its implications had never been explored. The stay order was not accompanied by any findings or any opinion. The District Court neither explained the grounds for staying the federal action nor cited any authority for its action.

The Ninth Circuit's Decision

The Ninth Circuit reversed and remanded the District Court's stay order. It did so because Arizona, in its state Constitution, has disclaimed jurisdiction over Indian water rights claims, as required by the Enabling Act. Arizona had argued that the disclaimer does not apply to water rights cases. Arizona had also argued that the McCarran Amendment to the Department of Justice Ap-

propriation Act of 1953, 43 U.S.C. 666, which waives the sovereign immunity of the United States in water rights cases, vitiates the disclaimer.[4] Relying on the companion decisions in *San Carlos Apache Tribe* and *Northern Cheyenne Tribe*, the Ninth Circuit rejected both arguments.

According to the Ninth Circuit, the disclaimer can be disregarded only if it has been repealed by Arizona pursuant to that state's procedures for amending its Constitution. The Ninth Circuit remanded the case to the District Court for a determination whether Arizona has effected such a repeal.

The Navajo Nation had argued that it should be permitted to proceed in federal court regardless of the disclaimer, because federal court abstention under *Akin* is not warranted. The Ninth Circuit did not expressly decide the abstention issue in *Navajo Nation*. However, in the companion case of *Northern Cheyenne Tribe*, the court held that abstention is indeed unwarranted. Likewise, in *San Carlos Apache Tribe* the Ninth Circuit, without deciding the issue, said that the case was significantly different from *Akin*, foreshadowing probable results in *Navajo Nation*.

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[4] The McCarran Amendment provides in pertinent part:

> Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

SUMMARY OF ARGUMENT

The order below merely vacates a stay and permits the Navajos to obtain a speedy, federal adjudication of their federal claim. It does not in any way interfere with the state court proceeding. Nothing about this interlocutory result warrants review by this Court.

The Ninth Circuit's holding on the disclaimer issue is not ripe for review, because the question of whether Arizona has repealed its disclaimer was remanded for decision by the District Court. That aspect of the disclaimer issue which the Ninth Circuit did resolve was correctly decided. In reaching its conclusion, the Ninth Circuit properly deferred to the provisions of the Arizona Constitution; a contrary result would constitute an unwarranted federal intrusion into state constitutional processes. Accordingly, intervention by this Court is not warranted.

Even if this Court were inclined to review the disclaimer issue in a case where it is dispositive, this is not such a case. Regardless of the disclaimer, there is an alternative ground for permitting the Navajos to proceed in federal court. Their case presents a narrow federal claim, raising no issues of state law; it can be quickly resolved in federal court without duplicating the state proceeding. The state proceeding, on the other hand, is not an adequate vehicle for resolving the Navajos' claim. Accordingly, this is not one of those few, "exceptional" cases subject to the narrow abstention rule of *Colorado Water Conservation District* v. *United States*, 424 U.S. 800 (1976) ("*Akin*"). Rather, this is a case where, in the words of *Akin*, the federal courts should discharge their "virtually unflagging obligation" to proceed.

ARGUMENT

I

THE RESULT REACHED BELOW DOES NOT WARRANT REVIEW

On its face, the order below merely vacates a stay and permits this action to go forward. It adjudicates no rights, resolves no claims, confers no remedies. This result is so interlocutory in nature that, we submit, it does not warrant this Court's intervention.

In practical terms, the order below merely affords the Navajo Nation an opportunity to pursue its federal claim in federal court. It permits the Navajos to ask a federal court (which concededly has jurisdiction), applying federal law (which concededly governs the merits), to interpret and enforce a federal treaty. This result is so consistent with common sense and traditional principles of federalism that, we submit, this Court should not reach out to review it.

In broader terms, the order below offers the Navajos an effective, streamlined procedure by which to vindicate rights solemnly granted by the United States more than a century ago. The alternative urged by petitioners would relegate the Navajos to an unwieldly state proceeding, where the decision would be delayed for decades; consequently, a whole generation, or more, of the Navajo people would be deprived of the opportunity to translate their legal rights into the economic development that they so sorely need. The result favored below is so consistent with basic principles of justice that, we submit, this Court should let it stand.

The order below does not, in any way, "frustrate" or interfere with the state general stream adjudication, as petitioners suggest (Pet. 22-23). It does not stay or enjoin that proceeding. It simply permits the Navajo Nation to obtain a declaration of its own rights under the Treaty of 1868. That discrete, narrow federal issue

can be swiftly adjudicated in federal court without duplicating or disturbing the Arizona proceeding. The state court meanwhile remains free to decide the multitude of state law claims at issue in the state general stream adjudication; it can incorporate the federal court's judgment by listing the Navajo Nation at its proper place in the hierarchy of claimants, and administer water rights in accordance with that list. Indeed, the legislation creating the Arizona general stream adjudication contemplates precisely this procedure. It provides that "when rights to the use of water or dates of appropriation have previously been determined in a judgment or decree of a court, [the court handling the general stream adjudication shall] accept the determination of such rights and dates of appropriation as found in the judgment or decree * * *." Ariz. Rev. Stat. Ann. § 45-257 (B)(1). The result, reached below, therefore, does not have an adverse impact on the state proceeding that merits this Court's attention.[5]

In sum, the result reached below does not warrant review by this Court. We turn now to a discussion of the legal issues addressed by the Ninth Circuit in reaching that result.

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[5] After the Ninth Circuit reached its decision below, the state court itself stayed the state proceeding—which, in any event, had never been really started—pending federal court resolution of the jurisdictional issues involving the Navajos. This result was reached without request by, or notice to, the Navajos. Presumably the state court wishes to know, before going forward, whether the Navajos will or will not be part of the state proceeding. However, not even the state court has suggested that it will abort the state proceeding if it is ultimately determined that the Navajos are not subject to its jurisdiction. On the contrary, in the companion *San Carlos Apache* case, the state court, while entering a similar stay, authorized the Department of Water Resources to "continue to investigate, gather, prepare and process information" on all claims except the claims of the Indians (Pet. App. G-2). In short, the state may proceed with respect to all but the Navajo claim if it wishes to do so.

II

THE HOLDING BELOW ON THE DISCLAIMER ISSUE DOES NOT WARRANT REVIEW

In reaching its result below, the Ninth Circuit invoked Article XX of the Arizona Constitution, which disclaims jurisdiction over Indian tribes and lands (see page 3 n.1, *supra*). Petitioners' argument here is limited almost exclusively to an attack on the Ninth Circuit's treatment of the disclaimer issue. We submit that the disclaimer issue is not worthy of review by this Court, for the following reasons:

First, the disclaimer issue has not been fully adjudicated, and hence any review thereof would be premature.

Second, to the extent it was adjudicated, the disclaimer issue was correctly decided below, and review thereof is not necessary.

Third, the decision below on the disclaimer issue properly defers to the state constitutional mandate. The State of Arizona is now engaged in an extraordinary effort to obtain a ruling that Congress vitiated a provision of the Arizona State Constitution. That effort should not be encouraged by this Court.

A. The Disclaimer Issue Is Not Ripe

The Court of Appeals addressed but did not fully answer the question whether Arizona's courts lack jurisdiction over Indian water rights claims. To be sure, it held that the Arizona Constitution disclaims such jurisdiction and that neither federal legislation nor prior federal court decisions nullify that disclaimer (Pet. App. B-4). But it expressly left open the question whether Arizona has repealed its constitutional disclaimer provisions, and it remanded the case to the District Court for an adjudication of that issue.[6]

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[6] The Ninth Circuit's decision in *Navajo Nation* remands without an explicit reference to the repeal issue. However, the companion

If it is decided on remand—as we believe it should be—that there has been no repeal, the disclaimer issue will be fully resolved and will turn partly on local issues not applicable beyond Arizona. On the other hand, if it is decided on remand that Arizona has repealed the disclaimer, the significance of the Ninth Circuit opinion challenged here will be considerably reduced.

In either event, the disclaimer issue will be cast in a different light. In either event, the aggrieved party will have an opportunity to pursue its appellate remedies (by appeal from a final order under 28 U.S.C. 1291 or by application under 28 U.S.C. 1292, depending on the circumstances). In either event, this Court will ultimately have the opportunity to decide whether review of the disclaimer issue is warranted after all aspects thereof—including the question of repeal—have been fully considered below and subjected to lower court analysis and decision. Review prior to that time would be premature and an inefficient use of this Court's resources.

B. The Disclaimer Issue Was Correctly Decided

In Article XX of its Constitution, Arizona disclaimed all jurisdiction over "lands lying within [Arizona's] boundaries owned or held by any Indian or Indian Tribes, the right or title to which shall have been acquired through or from the United States * * *." This disclaimer was mandated by the Arizona Enabling Act, the federal statute pursuant to which Arizona was admitted into the Union. 36 Stat. 557, 569. In the case at bar, the Ninth Circuit held that this disclaimer means what it says, that the Arizona constitutional provision has continuing vitality, and that Arizona is bound by it (Pet. App. B-4). Accordingly, the Ninth Circuit held, Arizona, as a "disclaimer state," cannot assert jurisdiction over

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opinion of the same panel of the court in *San Carlos Apache Tribe*, also arising from Arizona, makes it clear that the repeal issue is to be determined on remand (Pet. App. A-9).

the Navajos' claim to waters that flow through their reservation unless the State has repealed its constitutional disclaimer provision (*id.*, incorporating Pet. App. A-9).[7]

Petitioners make two arguments in support of their contention that this holding was erroneous.

First, petitioners argue that, notwithstanding the broad sweep of the disclaimer provision, Arizona was never thereby precluded from adjudicating Indian water rights. In support of this proposition, Arizona invokes numerous federal court decisions construing the disclaimer (Pet. 16-18). But the case law does not support Arizona's position; on the contrary, it demonstrates the soundness of the Ninth Circuit's determination below.

It is, of course, obvious that the disclaimer could not have been intended to apply to every legal matter, however modest or indirect, which in any way touches on a member of an Indian tribe. Accordingly, in a series of cases, the courts have isolated those instances where the impact of state jurisdiction on Indians is so limited that the disclaimer, properly construed, does not prevent it. In those instances, this Court has held, the "absolute jurisdiction" over Indians that the disclaimer provisions invest in Congress is not exclusive jurisdiction.

These decisions were summarized, and the governing rule was synthesized, in the leading case of *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164 (1973), which involved the very state, the very Indian tribe, and the very federal treaty at issue here. In *McClanahan*, this Court unanimously held that the disclaimer prevents Arizona from imposing its personal income tax on the Navajos. The Court concluded that the disclaimer applies except in very limited situations—specifically, when the state regulation does not infringe on tribal self-

[7] As noted above, the repeal issue was remanded.

government *and* does not jeopardize Indians' federal rights. *Id.* at 171. Only when both of these factors exist, this Court held, may a state assert jurisdiction. (The Court noted that these factors usually come into play only when the state action in question is designed to regulate the affairs of non-Indians or Indians who are not on the reservation.)

Petitioners have chosen to ignore *McClanahan* in their brief, but it is the dispositive authority. All of the cases cited by petitioners fall within the framework of the *McClanahan* rule, and none supports the argument that Arizona's disclaimer permits it to exercise jurisdiction over the Navajos' federal water rights claim.

Thus, in *Williams* v. *Lee*, 358 U.S. 217 (1958), this Court held that, because of the disclaimer, Arizona's courts could not assert jurisdiction over a private, civil damage claim brought by a non-Indian against an Indian and arising out of acts on the reservation. Such claims, it was held, must be heard in tribal courts. The Court asserted that the disclaimer is inapplicable only in those situations where "essential tribal relations [are] not involved *and* where the rights of Indians would not be jeopardized" (*id.* at 219; emphasis added). The exercise of state power presented in *Williams*, the Court held, disturbs "essential tribal relations"—and therefore fails the first part of this test—because it "infringes on the rights of Indians to govern themselves" (*ibid.*). But, contrary to petitioners' argument here, *Williams* did not hold—indeed, it did not even suggest—that potential interference with Indian self-government is the sole criterion by which the limits of disclaimer states' authority over the reserved federal rights of Indians are to be set. *Williams* simply held that such interference was itself enough to defeat Arizona's assertion of jurisdiction in that particular case. Consequently the exercise of state power was barred, and there was no need to ascertain whether it jeopardized the federal rights of Indians.

Petitioners nevertheless argue that the disclaimer applies only where the state's assertion of jurisdiction would interfere with tribal self-government. They reach this conclusion not only by ignoring *McClanahan* and misreading *Williams*, but also by mistakenly relying on *Organized Village of Kake* v. *Egan*, 369 U.S. 60 (1962). In *Kake*, this Court expressly held that a state may not assert jurisdiction over Indians if the state would thereby "interfere with reservation self-government *or* impair a right granted or reserved by federal law." *Id.* at 75 (emphasis added). *Kake* involved non-reservation Indians contesting Alaska's regulation of fishing traps. As this Court found decisive, the Indians did not prove that state regulation of fishing traps impinged on their self-government *and* the Indians did not assert any fishing rights derived from federal laws. *Id.* at 76. Therefore, this Court allowed Alaska to regulate the fishing traps of the non-reservation Indians, notwithstanding the disclaimer.[8]

In short, no case cited by petitioners deals with state court jurisdiction over Indian land or water disputes,

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[8] The other cases cited by petitioners are consistent with the rule set forth in *McClanahan*. In *White Mountain Apache Tribe* v. *Arizona*, 649 F.2d 1274 (9th Cir. 1981), disclaimer states were permitted to impose hunting and fishing license fees on non-Indians using a reservation. In *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973), the disclaimer state was allowed to tax an off-reservation enterprise of an Indian tribe. In neither of these cases did the state jeopardize the Indians' federal rights. Indeed the Court in *Mescalero Apache Tribe* clearly stated that a disclaimer state may *not* "impair a right granted or reserved by federal law" to the Indians (*id.* at 147-48). Finally, in *Puyallup Tribe* v. *Washington Dept. of Game*, 433 U.S. 165 (1977), although Indians asserted a federal right to take an unlimited number of fish from the Puyallup River (which was not on the reservation), this Court had held in a previous proceeding that the Indians had no such federal right. 391 U.S. 392, 398 (1968). Therefore, by limiting the number of fish any person could take, the State of Washington did not impair a federal right of the Indians.

or supports petitioners' argument. Here, the Navajos assert their federal reserved water rights under the 1868 Treaty and the decision of this Court in *Winters* v. *United States*, 207 U.S. 564 (1908). As the Ninth Circuit held below in *Northern Cheyenne Tribe* (Pet. App. C-1, C-11):

> The present case is not about fishing traps or licenses. More is at stake here than the mere power of a state legislature to regulate the use of fishing traps, where the power to regulate may have a secondary effect on Indian fishing rights; instead, the right of Indians to the water itself is at issue. The power of a court in a disclaimer state to enforce a regulatory statute that may adversely affect Indians falls far short of the power to adjudicate a direct challenge to Indian water rights in and to the water of streams.

If the disclaimer clause has any meaning at all, it must preclude state courts from deciding the Navajo Nation's federal reserved water rights.

Second, petitioners apparently contend that, in the McCarran Amendment, 43 U.S.C. 666, Congress implicitly repealed the state jurisdictional limitations and thereby empowered Arizona's courts to assume jurisdiction over Indian water claims (Pet. 17-19).

But even if the McCarran Amendment implicitly repealed the disclaimer provisions in the federal Enabling Act and thereby removed the federal *requirement* that Arizona disclaim jurisdiction over Indian water claims (and we dispute that it did so),[9] the McCarran Amend-

[9] The McCarran Amendment says nothing about state court jurisdictional limitations, state disclaimers, or repeal of federal Enabling Acts requiring state disclaimers. If Congress had intended such a repeal, it surely would have accomplished its purpose explicitly, rather than *sub silentio*. Moreover, only one year after the McCarran Amendment, Congress adopted Public Law 83-280, 67 Stat. 588 (1953), which *did* authorize disclaimer states to assume certain jurisdiction over Indians through appropriate amendments

ment itself could not confer on Arizona's state courts subject matter jurisdiction that is expressly disclaimed in Arizona's Constitution. Surely Congress cannot amend Arizona's Constitution. Congress may *permit* disclaimer states to assume jurisdiction over Indians, but the Arizona Constitution still disclaims such jurisdiction and thus precludes Arizona's courts from adjudicating the Navajos' water rights claim.

If the McCarran Amendment *sub silentio* gave Arizona the right to assume jurisdiction over reserved Indian water rights, and if Arizona wishes to exercise that right, the State may do so only through a proper repeal of its constitutional disclaimer. Such a repeal cannot be inferred from Arizona's silent response to a congressional enactment (*i.e.*, the McCarran Amendment, which itself was silent on the issue), and it ill behooves the State of Arizona to suggest otherwise for purposes of achieving a procedural victory in this action. Such a repeal requires affirmative action by Arizona in the manner required by its own law for the amendment of its own constitution. Ariz. Const., Art. XXI, §§ 1, 2 ("Mode of Amending"). In 1973, this Court concluded that Arizona had not yet effected any such repeal. *McClanahan* v. *Arizona State Tax Commission*, *supra*, 411 U.S. at 180. Whether it has done so since is an issue to be determined on remand.

Petitioners rely on this Court's decision in *Colorado River Water Conservation District* v. *United States*, 424

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of state law but which expressly excluded Indian water rights from the authorization. If the McCarran Amendment had already empowered disclaimer states to assume jurisdiction over Indian water rights, this express exception in Public Law would have been quite anomalous. Likewise, in 1968, long after the passage of the McCarran Amendment, Congress amended Public Law 83-280 to require the consent of Indian tribes to any repeal of state disclaimers—without any change in the water rights exception. 82 Stat. 78-79, codified in 25 U.S.C. 1321, 1322. The 1968 Amendment is further evidence that Congress did not intend the McCarran Amendment to have the effect petitioners urge.

U.S. 800 (1976) ("*Akin*"), to support their contention that the disclaimer is not a bar to state court jurisdiction here (Pet. 14 & n.17). But the disclaimer question was never addressed in *Akin*. *Akin* involved a state general stream adjudication in Colorado. This Court said that the McCarran Amendment's waiver of sovereign immunity as to the United States covers the Indians as wards of the United States; hence Colorado could assert jurisdiction over the Indians through their trustee, the United States. But Colorado is not a disclaimer state, and the Court in *Akin* therefore did not need to consider, and did not consider, what effect, if any, a disclaimer would have on the state's jurisdiction, which is the issue presented here. In support of their argument to the contrary, petitioners rely not on anything set forth in *Akin* itself but on an amicus brief filed in that case which erroneously attempted to characterize Colorado as a disclaimer state (see Pet. 14 n.17). The brief was wrong, and this Court accordingly ignored its argument and ignored the disclaimer issue.

In sum, review here should be denied because the Court of Appeals' ruling is sound. Its interpretation of the Arizona disclaimer accords with the original understanding of those provisions and with the decisions of this Court. Adjudication of the Navajos' water rights should not be further delayed while this Court confirms the correctness of the Court of Appeals' decision. Even if this Court were inclined to examine the disclaimer question, it should do so in another case in which a federal court of appeals improperly upholds the dismissal of an Indian water rights suit in deference to state proceedings, notwithstanding a valid state disclaimer.

C. The Holding Below Strikes the Proper Balance Between State and Federal Power

Petitioners attempt to portray the decisions below as an unwarranted federal intrusion into state affairs (Pet. 22-25). This argument stands reality on its head. It is

petitioners who would allow the State to block a federal court adjudication of a uniquely federal claim asserted by a sovereign Indian tribe over whom the State of Arizona has expressly disclaimed jurisdiction. The decision below does no more than permit that limited and appropriate federal action to go forward; it does not interfere in any way in the state court adjudication of state-law water claims.

Moreover, the decision below relies on and applies the Arizona Constitution. It recognizes that Arizona has the power to amend its own constitution, by following its own procedures, and remands for a determination of whether such an amendment has taken place.[10] But it rejects the argument that the federal government, by legislation or judicial decision, has implicitly amended the Arizona constitutional provision or robbed it of all meaning.

In short, the decision below affirms the vitality of the Arizona Constitution and the primacy of Arizona's own procedures for modifying that Constitution. It is the State of Arizona, as a petitioner here, which is in the curious position of arguing that federal legislation and federal court decisions, *sub silentio*, have emasculated Arizona's constitutional disclaimer (Pet. 12-14). It is the State of Arizona which is urging this Court to adopt a legal argument that elevates the power of federal institutions to intrude upon state constitutional provisions.

The decision below strikes the proper balance between the powers of the states and the powers of the federal government. The argument advanced by Arizona would disturb that balance, to the detriment of the states. We submit that Arizona's effort should not be encouraged, and the implications of its argument should not be furthered, by granting the writ sought here.

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[10] On remand, the court will also have to determine "whether such repeal required tribal consent as provided in the 1968 amendment to Public Law 280" (Pet. App. C-8).

The Ninth Circuit noted that its result differed from the result reached by the Tenth Circuit in *Jicarilla Apache Tribe* v. *United States*, 601 F.2d 1116 (10th Cir.), cert. denied, 444 U.S. 995 (1979). For the various reasons set forth in this brief, we submit, these differences should not be reviewed by this Court on this petition. We note, moreover, that the differences may be more apparent than real because of important distinctions between the situations presented to the two circuits.

In *Jicarilla Apache Tribe*, the Tenth Circuit found that the proper party to assert the Indian water rights claim there at issue was the United States in its capacity as trustee for the tribe, rather than the tribe appearing in its own right. The Tenth Circuit made this finding in light of several facts in the record before it, facts which are not present here. For example, in *Jicarilla Apache Tribe*, the United States as trustee for the Indian tribe had appeared in the state general stream adjudication, and was vigorously asserting the rights of the tribe, before the tribe attempted to assert a federal water rights claim on its own behalf. In this case, by contrast, the Navajo Nation initiated the claim itself and has proceeded solely on its own behalf; the United States has never, to this day, purported to act for it. In *Jicarilla Apache Tribe*, the Tenth Circuit, after reviewing all the facts, did not find that there was any significant conflict between the United States and its ward, the Indian tribe. Here, by contrast, the Ninth Circuit expressly found such a conflict because of the substantial and diverse water rights interests of the United States (see Pet. App. C-15 to C-17).[11]

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[11] Regardless of whether such conflict disqualifies the United States from functioning on behalf of the Indians (an issue that need not be reached), the Ninth Circuit concluded it would not be "wise or appropriate" under such circumstances to block the Indians' federal action in favor of the state proceeding.

The Tenth Circuit's reasoning and holding in *Jicarilla Apache Tribe* turned largely on its finding that the United States as trustee—and not the Indian tribe—could and should pursue the tribe's claim. The Tenth Circuit reasoned that the state disclaimer—which on its face applies only to Indian tribes—is irrelevant when a state general stream adjudication properly names not the Indian tribe but the United States (as trustee for the Indian tribe) as a party. The Tenth Circuit also noted, based on *Akin*, that the McCarran Amendment's waiver of sovereign immunity—which on its face applies only to the United States—covers Indians where the United States appears as trustee for the Indians. Therefore, it reasoned, a state disclaimer vesting jurisdiction in Congress was satisfied when Congress, in the McCarran Amendment, exercised that jurisdiction by subjecting Indians, through the United States as trustee, to suit in state court.

While the Ninth Circuit disagreed with this reasoning, as we do, it does not bear on this case. Here, the United States has not appeared as and is not functioning as the Navajos' guardian. Indeed, the United States has been named as a defendant and has water rights interests adverse to the Navajos'.[12]

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[12] Petitioners allege (Pet. 7) that, in July 1981, process was served on all potential claimants in the state's Little Colorado River general stream adjudication and that the United States was joined "to adjudicate not only its own rights, but also those rights it holds on behalf of its Indian wards"—presumably including the Navajos. There is no record support for this assertion; and any such service of process—occurring *after* this case was argued in the Court of Appeals and in response to arguments asserted by the Navajos to the Court of Appeals—does not undermine the Ninth Circuit's finding of a conflict of interest. Moreover, if post-argument, non-record matters are to be considered, we note that Arizona also mailed papers, presumably purporting to be process in the state proceeding, to the Navajo Nation, in its own name, after the Court of Appeals' argument.

III

BECAUSE *AKIN* IS AN ALTERNATIVE GROUND FOR PERMITTING THIS CASE TO PROCEED IN FEDERAL COURT, THE DISCLAIMER ISSUE IS NOT DISPOSITIVE AND THEREFORE DOES NOT WARRANT REVIEW

As noted in Points I and II, *supra*, the Ninth Circuit's interlocutory ruling does not fully resolve the disclaimer issue and does not in any way adjudicate the merits of the Indians' water rights claims. Nor is it dispositive of the threshold procedural issue of whether this action should go forward in federal court. On the contrary, even if the Ninth Circuit had ruled in petitioners' favor on the disclaimer issue, it would have permitted the Navajos to proceed in federal court. As the Ninth Circuit made clear in its companion opinion below in *Northern Cheyenne Tribe* (Pet. App. C-1 to C-22), this is not one of those "exceptional" and rare cases subject to the narrow abstention rule of *Akin*. Rather, this is the more typical case where, in the words of *Akin*, the federal courts should discharge their "virtually unflagging obligation * * * to exercise the jurisdiction given them." 424 U.S. at 817.

Application of the *Akin* criteria to this action requires a rejection of petitioners' efforts to dismiss or stay the case. In light of the existence of this alternative basis for the result below, the significance of the disclaimer issue is drastically reduced if not eliminated. In short, even if this Court were inclined to examine the disclaimer issue in a case in which it was dispositive, this is not such a case.[13] Petitioners ignore this problem.

In any event, review of the *Akin* issues is not warranted here. The District Court made no findings what-

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[13] Even in *Jicarilla Apache Tribe* v. *United States*, *supra*, where the disclaimer issue *was* dispositive, this Court denied certiorari.

soever in support of its deference to the state proceeding, and the Ninth Circuit's rejection of such deference—while clear from its opinions in the companion cases—is not coupled with an analysis of the particular facts of this case. Moreover, in *Akin*, this Court established general guidelines for abstention, to be applied by the lower courts on the basis of a careful appraisal of the peculiar facts and circumstances of each case. 424 U.S. at 818-819. This Court should not grant review merely to apply those guidelines to an individual case; it should intervene only in unusual circumstances not present here.

We discuss the *Akin* issues briefly to demonstrate the existence of a strong alternative ground for permitting this case to proceed in federal court—an alternative that sharply reduces the significance of the disclaimer issue.

In *Akin*, this Court held that federal courts have jurisdiction over Indian water rights claims, stressed the strong "obligation" of the federal courts to exercise that jurisdiction, and reiterated the general rule that such federal actions should *not* be dismissed in deference to concurrent state proceedings. 424 U.S. at 817. The Court held that the federal courts should abstain in favor of concurrent state proceedings only in certain "exceptional" cases, such as *Akin* itself. When the "exceptional circumstances" that led to the result in *Akin* are not present, federal courts should proceed in the ordinary manner to decide cases properly before them. 424 U.S. at 818. That is the situation here, for the following reasons:

First, *Akin*'s concern for avoiding wasteful litigation does not impede the exercise of federal jurisdiction here. In *Akin*, the United States was in substance urging that the federal court do precisely what the Colorado state courts already were doing—untangling all the many state and federal claims and priorities of a multitude of claimants to the same waters. By contrast, the Navajo Nation does not ask the federal court to determine the claims

of any other water user, to decide any state-law questions, to assume general jurisdiction over all claims to certain waters, to appoint a water master, or to undertake the burden of administering any water rights. In the *Navajo* case, a single claimant with a unique, narrow federal claim seeks only to have its own federal rights (and no others) declared in federal court. There is no reasonably foreseeable danger that the federal action will duplicate state proceedings or waste judicial resources. After the rights of the Navajo Nation have been determined, Arizona can simply incorporate the federal judgment in the State's general stream adjudication and then list the Tribe at its proper place in the hierarchy of claimants to the Little Colorado River. See Ariz. Rev. Stat. Ann. § 45-257(B)(1).

Indeed, contrary to petitioners' dire predictions (Pet. 22-25), these federal actions may actually help conserve judicial resources. The Little Colorado River is an interstate stream, and adjudication of the Navajo Nation's water rights in one sharply focused federal action will avoid the need for state courts in both Arizona and New Mexico to address the same subject, with the attendant possibility of conflicting results. Moreover, because the Navajo Nation's reserved rights arose at an early date and encompass a very substantial portion of the Little Colorado's waters, a prompt federal declaration of those rights might well persuade many potential parties to the state general stream adjudication to forgo prosecution of their claims.[14]

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[14] The dissent in *San Carlos Apache Tribe* (Pet. A-13) incorrectly suggests that the tribes' federal suits for adjudication of their reserved water rights are likely to be ineffective because the United States has not consented to be sued in such actions. Relying on *Dugan* v. *Rank*, 372 U.S. 609 (1963), the dissent asserts that the McCarran Amendment's waiver of sovereign immunity applies only to general stream adjudications. The dissent is wrong for at least two reasons.

First, the McCarran Amendment, 43 U.S.C. 666, grants consent to join the United States as a defendant in "*any suit* * * * for the

Second, this Court suggested in *Akin* that, had "the involvement of state water rights [been] less extensive" in that federal action, deference to the Colorado state proceeding might have been inappropriate. 424 U.S. at 820. The state issues injected into the federal suit in *Akin* were indeed "extensive": The United States as plaintiff named 1,000 separate defendants and asked that each be required to appear and submit his claims for adjudication and administration by the district court.

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adjudication of rights to the use of water of a river system or other source, * * * where it appears that the United States is the owner of or is in the process of acquiring water rights * * * and the United States is a necessary party to such suit" (emphasis supplied). The language of the statute is not limited to general stream adjudications, and no such restriction is fairly implied.

Dugan v. *Rank* is inapposite. That case did not involve a party's effort to adjudicate its federal water rights against a class of all other claimants of ownership or use rights to the water in a particular stream. Rather, *Dugan* v. *Rank* was a suit to block a federal reclamation project. The United States as defendant was a narrow target of a specific claim, rather than simply part of the universe of adverse claimants whose presence is necessary for a binding adjudication. Moreover, the legislative history of the McCarran Amendment shows quite clearly that the waiver of sovereign immunity was not intended by Congress to authorize suits against the United States to enjoin federal reclamation projects. See S. Rep. No. 755, 82d Cong., 1st Sess. 9 (1951). No such evidence suggests that Congress wished to refuse consent to suit in actions designed to adjudicate the federal rights of one claimant—particularly an Indian tribe asserting rights under a treaty with the United States—against all other claimants to the waters of a particular river.

Second, even if the United States were immune from joinder as a defendant, this action should still go forward in federal court. The final judgment that would be rendered in *Navajo Nation* would directly bind all adverse claimants other than the United States, and it would have a substantial *stare decisis* effect on the federal government. The United States would not be obliged to relitigate the federal court's determination, and it has not indicated any intention to do so. Moreover, it would ill befit the United States, as guardian of the tribes, to attempt to undermine the outcome of federal actions brought by its wards.

Ibid. Most of these claims were based on state law and would have required the federal district court to decide matters not within its special expertise. Here, by contrast, the federal action involves *no* issues of state water rights; the Navajo Nation seeks only an adjudication of its own federal reserved water rights. The Navajos' claim is uniquely appropriate for federal adjudication; the federal rights of Indian tribes are matters within the special competence of the federal courts, and the present case asks the district court to resolve only matters of that kind.

Third, this Court indicated in *Akin* that, where "the state proceeding [is] in some respect inadequate to resolve the federal claims," deference to the state proceeding might well be inappropriate. 424 U.S. at 820. Here, the state proceeding is so unwieldly and is subject to such extraordinary delay that it is simply not a realistic, viable alternative, and deferral to it would severely prejudice the Navajo Nation. In the 27 months from the commencement of the state proceeding to the argument of this federal action in the Court of Appeals, the state proceeding made no progress whatsoever. Not one of the 58,000 potential claimants to the Little Colorado was even served with process. Nor would service of process signal the start of meaningful proceedings; in fact, a request has been made to defer the general stream adjudication of the Little Colorado until after the resolution, in other complex proceedings, of claims to the Salt, Verde, and Gila Rivers. R.E. 62.[15] When and if the state adjudication of the Little Colorado begins to lurch forward, it would take many years, if not decades, to adjudicate the tens of thousands of claims at issue. By contrast, the Navajos' narrow, federal claim can be swiftly adjudicated in federal court.

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[15] "R.E." refers to the Record Excerpts filed in the Court of Appeals.

Moreover, unlike the situation in *Akin*, the Arizona state proceeding is inadequate because the Navajo Nation's rights to the waters cannot be adequately determined there; a further proceeding would have to be brought in New Mexico. Only in the federal action can the Navajos get a full adjudication of their claim.

Fourth, as we have noted, the cases decided below were brought by the Indian tribes themselves, not, as in *Akin*, by the United States as trustee for the Indians. Federal jurisdiction here is asserted under 28 U.S.C. 1362, not, as in *Akin*, under 28 U.S.C. 1345. Section 1362 gives the federal courts original jurisdiction over all federal claims brought by an Indian tribe. In *Akin*, this court expressly reserved the question of whether abstention as a matter of "wise judicial administration" would *ever* be appropriate in a water suit brought by a private party rather than by the United States. 424 U.S. at 820 n.26. At least where the plaintiff is an Indian tribe invoking the special jurisdictional grant in Section 1362, we submit that question should be answered in the negative.

Congress enacted Section 1362 in order to ensure the availability of a neutral federal forum for the resolution of Indian claims. It recognized that such claims are ordinarily governed by federal law and are peculiarly appropriate for resolution in federal court. See H.R. Rep. No. 2040, 89th Cong., 2d Sess. (1966). The legislative purpose would be frustrated if the Indians now could be forced to litigate their water claims in state court. As the Ninth Circuit said below (Pet. App. C-17):

> If this court were to further extend *Akin* * * * to a suit brought by an Indian tribe, the result could prevent Indians from fully litigating their rights to water in federal court. Each time a tribe sued in federal court, the state need only join the United

> States as a party to obtain dismissal of the federal action. It is contrary to all reason to permit the states to frustrate federal jurisdiction merely by joining the United States as a party.

The tribes have not waived their sovereign immunity from suit in state courts, and, especially in light of the policy underlying Section 1362, they should not be compelled to litigate there as a matter of "wise judicial administration." [16]

In sum, the distinctions between this case and *Akin* are numerous and significant. The Navajos should be permitted to proceed in federal court, whether or not the Arizona disclaimer provisions preclude state court jurisdiction. The present case therefore is not an appropriate vehicle for this Court's review of the disclaimer question. The answer to that question would have no practical effect on the choice of a forum in which to resolve the Indians' water rights claims.

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[16] If the tribes cannot obtain a federal determination of their reserved water rights, they will be compelled either to rely on the representation of the United States in state proceedings or to appear in such proceedings to defend their own interests. The Ninth Circuit described the inequity of such a result in the following terms (Pet. App. C-16 to C-17):

> In the present case, the Indian tribe appears to be a necessary party to the state court proceeding, yet neither Congress nor the Tribe has consented to such a suit in state court. Under these circumstances, where the sovereign immunity of the Tribe has not been waived, and there is a conflict of interest between the Tribe and the United States, the Tribe could only protect its rights by intervening, at the expense of its basic right to sovereign immunity. We will not put the Tribe to this Hobson's choice.
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> * * * Our examination of this conflicts factor leads us to conclude that it would not be wise or appropriate for the federal court to give up its traditional jurisdiction and defer to the state court in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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